Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1995

INSINGER MACHINE COMPANY,

Petitioner,

vs.

PHILADELPHIA TAX REVIEW BOARD,

Respondent.

Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not the City of Philadelphia's Business Privilege Tax and/or its gross receipts tax is valid as to manufacturers because it is unconstitutional under the Federal and/or State Constitutions being violative of various articles, clauses and amendments to the United States Constitution and the Commonwealth of Pennsylvania Constitution including but not limited to the Commerce Clause, and being violative of the amendments to the United States Constitution because of a lack of uniformity, and that there is a denial of equal protection and due process and it is punitive in its application, U.S. Const. Art. 1, § 8, Cl. 3; U.S. Const. Amends. Five, Six, Seven, Eight and Fourteen.

Whether or not the City of Philadelphia Tax Review Board misapplied and/or committed an abuse of discretion in applying the Philadelphia Business Privilege Tax and/or its gross receipts tax to manufacturers.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	14

TABLE OF CITATIONS

Cases Cited:

American Trucking Association v. Schiner, Secretary, Department of Revenue of Pennsylvania, 483 U.S. 266, 107 S. Ct. 2829 (1987)	10
American Trucking Associations v. Smith, 110 S. Ct. 2328 (1990)	10, 11
Atlantic Refining Company Case, 398 Pa. 30, 156 A.2d 855 (1959)	6

Contents

	Page
Cali v. Philadelphia, 406 Pa. 290, 177 A.2d 824 (1962)	12
Crawford v. Southern Fulton School District, 431 Pa. 324, 246 A.2d 332 (1968)	6, 7, 9
Fischer v. City of Pittsburgh, 383 Pa. 138, 118 A.2d 157 (1955)	6
Gold Triangle Broadcasting, Inc. v. City of Pittsburgh, 483 Pa. 525, 397 A.2d 1147 (1979)	6
Golden Triangle, etc. v. City of Pittsburgh, 397 A.2d 1147 (1979)	9
Harsco v. City of Pittsburgh, 516 Pa. 562, 533 A.2d 1012 (1987)	5, 7
H.J. Heinz Co. v. City of Pittsburgh, 170 Pa. Super. 435, 87 A.2d 96 (1952)	9
In re Women's Homeopathic Hospital of Philadelphia, 393 Pa. 313, 142 A.2d 292 (1958)	12
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 110 S. Ct. 2238 (1990)	10, 11
Statutes Cited:	
1 Pa. C.S.A. § 1501	13

Contents

Page

1 Pa. C.S.A. § 1922 13

1 Pa. C.S.A. § 1992(1) (Supp. 1978) 9

25 P.S. Section 13133 12

28 U.S.C. § 2101 1

Local Tax Enabling Act, Section 4 6

United States Constitution Cited:

Fifth Amendment ..... i, 1, 11

Sixth Amendment ..... i, 1

Seventh Amendment ..... i, 1

Eighth Amendment ..... i, 1

Fourteenth Amendment ..... i, 1, 11

Art. 1, § 8, Cl. 3 .....i, 1, 8, 10, 11

APPENDIX

Appendix A — Order of the Supreme Court of Pennsylvania, Middle District Entered May 10, 1995 . 1a

Appendix B — Order of the Supreme Court of Pennsylvania Entered March 31, 1995 ..... 3a

Contents

	Page
Appendix C — Opinion and Order of the Commonwealth Court of Pennsylvania Filed June 24, 1994	4a
Appendix D — Opinion of the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania , Civil Trial Division Entered October 19, 1993	13a
Appendix E — Decision of the Tax Review Board Dated March 1, 1993	16a
Appendix F — Decision of the Tax Review Board Dated August 19, 1992	18a
Appendix G — Decision of the Tax Review Board Dated April 13, 1988	20a

Petitioner, the Insinger Machine Company, by and through its attorney, Richard L. Cantor respectfully requests that the United States Supreme Court grant their Petition for a Writ of Certiorari.

OPINIONS BELOW

The jurisdiction of the Supreme Court is being invoked by seeking appeal to the Court from the Denial of Appellant's Refund Petition by the Refund Unit of the City of Philadelphia on April 13, 1988; Denial of Tax Review Board's Decision denying Appellant's Refund Petition on August 21, 1992; Denial of Relief by the Court of Common Pleas, affirming the Tax Review Board's Decision, Order dated May 25, 1993; Denial of Relief by the Commonwealth Court of Pennsylvania, affirming the Court of Common Pleas Decision, Order dated June 24, 1994; Pennsylvania Supreme Court's Denial of Appeal Order entered on March 31, 1995 and subsequent Denial of Petition for Reconsideration on May 10, 1995.

STATEMENT OF JURISDICTION

Petitioner seeks review of an opinion of the Commonwealth Court of Pennsylvania, entered June 24, 1994. The United States Supreme Court has jurisdiction of the within appeal pursuant to 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions: the Fifth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Fourteenth Amendment and Article 1, Section 8, Clause 3 of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Insinger Machine Company, hereinafter referred to as Insinger, which is a Maryland Corporation, is a manufacturer of commercial kitchen equipment. The Petitioner, Insinger, has been in business for over 100 (one hundred) years; and for that 100 (one hundred) years, the principal place of business has been the City of Philadelphia, in the Commonwealth of Pennsylvania. It has a workforce of approximately 125 employees, pays the City of Philadelphia wage taxes of approximately $125,000, real estate taxes of approximately $7,500 and of course business privilege taxes and/or gross receipts taxes which are the subject of this appeal.

Insinger filed a petition with the City of Philadelphia's Department of Revenue for a refund on March 23, 1988 seeking refunds for 1985 for $4,670, 1986 for $8,025 and for 1987 for $10,687, totalling $23,382. On April 13, 1988, the refund petition was denied by the Refund Unit of the Department of Revenue. A petition for refund appeal with the City of Philadelphia Tax Review Board was filed on May 6, 1988.

The Tax Review Board finally heard the matter as a full hearing on August 11, 1992. The Tax Review Board denied Insinger's Refund Petition at the conclusion of the hearing on August 11, 1992. Significantly, the City of Philadelphia stipulated that Petitioner is a manufacturer, and the Tax Review Board was then compelled to make certain legal rulings. However, the issue of the Business Privilege Tax and/or Gross Receipts Tax constitutionality was articulated but inasmuch as the Tax Review Board would not and could not rule on its constitutionality, they did not so rule and make findings of fact and conclusions of law on the constitutional issues.

On August 21, 1992, Insinger received written Notice of the Tax Review Board's decision denying Insinger's Refund Petition.

Insinger then filed an appeal of the City of Philadelphia Tax Review Board's Denial of their Refund Petition on September 18, 1992 with the City of Philadelphia Court of Common Pleas.

Then on March 1, 1992, the Tax Review Board filed their opinion with the Court of Common Pleas and a certified copy of the record from the Tax Review Board hearing.

A briefing schedule was issued by Judge Avellino of the Court of Common Pleas. Both parties submitted briefs and oral argument was made on May 20, 1993. Judge Avellino, being fully apprised of the briefs and expressing sympathy with Insinger's arguments with regards to the Business Privilege Tax's unconstitutionality, nonetheless denied Insinger's appeal and affirmed the Tax Review Board's decision of August 21, 1992.

Insinger filed its Notice of Appeal to the Commonwealth Court on June 18, 1993.

Judge Avellino of the Court of Common Pleas issued an Order for a R.A.P. 1925(b) Petitioner's Concise Statement of Facts Complained Of in its appeal to the Commonwealth Court. Insinger filed its 1925(b) Petitioner's Concise Statement of Facts Complained Of in its appeal to the Commonwealth Court on July 20, 1993.

Judge Avellino of the Court of Common Pleas issued his Opinion on October 19, 1993.

The original record was certified and lodged with the Commonwealth Court on October 28, 1993. A briefing schedule

was issued and a designation of the record was sent on November 4, 1993 by Federal Express next day delivery.

After hearing oral argument en banc on May 11, 1994, the Commonwealth Court affirmed the Common Pleas Court decision by Order of June 24, 1994 and issued its Opinion.

REASONS FOR GRANTING THE WRIT

Respondent has stipulated that Petitioner is a manufacturer and would therefore be eligible for a refund if this Court accepts Petitioner's argument.

Is the City of Philadelphia's Business Privilege Tax valid as to manufacturers? The Tax Review Board and the City of Philadelphia seem to think so, Petitioner does not.

Was the Philadelphia Tax Review Board's application of the Business Privilege Tax to Petitioner, Insinger Machine Company, and the Board's denial of Petitioner's petition for a refund an abuse of discretion?

The Petitioner categorically states that it is an abuse of discretion and constitutionally invalid both as to the Pennsylvania Constitution and as to the United States Constitution.

The law in the Commonwealth of Pennsylvania is that manufacturing is a classification of a type of business which is excluded from Business Privilege Taxes and/or any tax which attempts to levy on gross sales volume. This exclusion is valid for any city with a population of less than one million, that is the exclusion is for all but Class 1A cities.

Class 1A cities have different tax enabling legislation,

granting power within the Class 1A cities through their home rule charters and specific taxing ability.

Bearing in mind at all time that the Commonwealth of Pennsylvania has but one Class 1A city, Philadelphia and its designation as such is driven solely by its population size, not its physical boundaries, its square mileage or its proximity to transportation or commerce.

Rather uniquely in the Commonwealth of Pennsylvania, the City of Philadelphia, solely because of the size of its population has sought and does tax (levy) Philadelphia manufacturers with a Business Privilege Tax and a Gross Receipts Tax, based upon sales volume.

The City of Philadelphia is aware of and cognizant of the fact that nowhere else in the Commonwealth of Pennsylvania is it permissible to levy a Business Privilege Tax and/or a Gross Receipts Tax on a manufacturer in this state.

It is Petitioner's argument that the State Legislature (General Assembly) did not intend for the City of Philadelphia to levy a Business Privilege Tax and/or a Gross Receipts Tax on Philadelphia manufacturers as a valid exercise of Philadelphia's Tax Enabling Act. Assuming that Philadelphia's levying of a Business Privilege Tax and/or a Gross Receipts Tax on manufacturers was within the scope of its Tax Enabling Legislation. The tax is so inherently anti-competitive to Philadelphia manufacturers and prejudicial as to be constitutionally invalid both under the State Constitution and the Federal Constitution.

The Pennsylvania Supreme Court in *Harsco v. City of Pittsburgh*, 516 Pa. 562, 56-68, 533 A.2d 1012-14 (1987), stated that the intent of the General Assembly in enacting the restriction

on manufacturer business privilege taxation "was 'to make Pennsylvania manufactured products more competitive in the open market by prohibiting all taxes which would be included directly in the cost of the product.' *Crawford v. Southern Fulton School District,* 431 Pa. 324, 330, 246 A.2d 332, 335 (1968). The rationale behind the restriction 'is an economic one in that it provides that Pennsylvania manufacturers should not be burdened with an additional tax on their products since such products have to compete with products of other states . . .' *Atlantic Refining Company Case,* 398 Pa. 30, 35, 156 A.2d 855, 857 (1959)."

Let us apply this argument to the current facts. How totally illogical is it to reason that when the state supreme court discusses making Pennsylvania products more competitive in the open market and that Pennsylvania manufacturers should not be burdened with an additional tax on their products since they have to compete with products of other states. They meant everywhere in Pennsylvania except in Philadelphia for Philadelphia manufacturers. Simply without engaging in hyperbole, it's absurd. It is a conclusion that was never really intended nor envisioned by the General Assembly and it is a result which makes the Philadelphia Manufacturers Business Privilege Tax unconstitutional under both the State and Federal Constitution.

This Court has also previously held that section (4) of the Local Tax Enabling Act represents a limitation of a municipality's ability to tax. As such it must be strictly construed against the taxing authority. *See Gold Triangle Broadcasting, Inc. v. City of Pittsburgh,* 483 Pa. 525, 534, 397 A.2d 1147, 1151 (1979); *Fischer v. City of Pittsburgh,* 383 Pa. 138, 1414-42, 118 A.2d 157, 159 (1955).

In *Crawford v. Southern Fulton School District, supra,* this court examined a predecessor tax enabling statute which

contained the same limitation on the power of municipalities to tax. The court, for purposes of analysis, separated the section as follows:

> The first section forbids taxes on manufactured articles, natural resources and farm products.
>
> The second forbids taxes on the processing and preparation of those items.
>
> The third section . . . forbids taxes on "any privilege, act or transaction related to . . . the production, preparation or processing . . . of farm products by farmers with respect to the . . . products of their own manufacture, production or growth . . ."
>
> The fourth forbids taxes on any "privilege, act or transaction", involved in the processing of by-products of manufacture.
>
> The fifth forbids taxes on the transportation and storage of those items.

Id. at 329, 246 A.2d at 334.

The Pennsylvania Supreme Court went on to say in *Harsco v. City of Pittsburgh, supra.*

> Moreover, the economic rationale which the Court enunciated in the *Crawford, supra,* and the *Atlantic Refining, supra,* cases, supports Appellant's position. The facts in this case indicate that Appellant's product is

> extracted from the waste by-product of the original manufacturing process. It is then returned to the manufacturing process to be used as a component in further manufacturing, either by the original manufacturer, Jones & Laughlin, or another steel manufacturer. Since the rationale behind section 2(4) is to preclude taxation on manufactured products, thereby making them more competitive in the open market, it seems inconsistent with that rationale to allow this hidden tax on material which is derived from the original manufacturing process and returned thereto for the further purpose of manufacturing.

Here Philadelphia and Philadelphia alone in the Commonwealth of Pennsylvania imposes a Business Privilege Tax on manufacturers. A Philadelphia manufacturer and a manufacturer outside Philadelphia bid on a job in Philadelphia. The Philadelphia manufacturer is competitively disabled because of the Business Privilege Tax. His cost of goods will inherently be higher and therefore more expensive, so the Philadelphia manufacturer loses the bid to the non-Philadelphia manufacturer for a job in Philadelphia. A Philadelphia tax that favors non-Philadelphia manufacturing businesses over Philadelphia manufacturing businesses for no other reason than location of its business is prohibited by the Commerce Clause, U.S. Const. Art. 1, § 8, Cl. 3. Eventually the Philadelphia manufacturer loses enough bids to compel them to move outside Philadelphia's physical boundaries, thereby causing Philadelphia to not only lose the Business Privilege Tax revenue but Wage Tax Revenue, Use & Occupancy Revenue, lower real estate assessed value and less real estate taxes. In real terms, if Petitioner moved outside the City of Philadelphia's boundaries, the City would not only lose

Business Privilege Tax of $8,000 per year, but wage taxes of $125,000 and lower real estate taxes than the current $7,500. What the Pennsylvania Supreme Court is saying is that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa. C.S.A. § 1992(1) (Supp. 1978).

In *Crawford v. Fulton School District*, 431 Pa. 324, 331, 246 A.2d 332, 336 (1968), the state supreme court stated without reservation and repeatedly quoting from *H.J. Heinz Co. v. City of Pittsburgh*, 170 Pa. Super. 435, 87 A.2d 96 (1952). In *Heinz*, the Superior Court struck down a mercantile license tax based on the dealer's annual gross business. "It apparently is a part of the policy of the legislature of Pennsylvania in fostering industry to reserve to itself the taxation of manufacturing in all of its phases. The 1949 amendment in prohibiting the taxation of 'any privilege, act or transaction related to the business of manufacturing' is a manifestation of that policy." *Heinz, supra*, 170 Pa. Super. at 480, 87 A.2d at 98. Like *Isaly*, these two cases dealt with taxes directly affecting the "business of manufacturing". The cases are agreed that taxes levied at any stage of production are not permitted by the Act. Taxes based on sales volume or net profits, however, do have a direct effect on the cost of each product. As borne out by Mr. Leonard Cantor's testimony before the City of Philadelphia's Tax Review Board, it is a factor in the cost of goods sold, it effects the selling price of the product and thereby the product and the company's competitive position in the market place. It is this direct effect which the legislature was attempting to prevent.

In the *Golden Triangle, etc. v. City of Pittsburgh*, 397 A.2d 1147, 1153 (1979), it was noted "finally, it is important to remember that the limitation placed by the legislature on the City's authority to tax is intended to encourage the growth of manufacturing in this Commonwealth."

Respondent would say to this Court, "The cases cited deal primarily with Pittsburgh and their enabling the legislation is different than Philadelphia." What sense does any of the court's statements make with regards to promoting uniformity, being competitive, to encouraging job growth, and reserving the right to tax manufacturers by the General Assembly if Philadelphia's Tax Enabling Act allows it to act independently of the rest of the state and in direct contravention of what the state supreme court stated repeatedly that it was trying to promote, uniformity, fairness and job growth by reserving the taxing power over manufacturers only to the General Assembly on a statewide basis.

In the landmark case of *American Trucking Association v. Scheiner, Secretary, Department of Revenue of Pennsylvania*, 483 U.S. 266, 107 S. Ct. 2829 (1987), the United States Supreme Court dealt with a similar problem and the Court found the Pennsylvania statute unconstitutional. The Supreme Court applied the "internal consistency" test and found the tax act invalid. The Court stated that the Commerce Clause may be satisfied if revenue measures maintain state boundaries as a neutral factor in economic decision making. U.S. Const. Art. 1, § 8, Cl. 3. *See also, American Trucking Associations, Inc. v. Smith*, 110 S. Ct. 2328 (1990) and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990).

Similarly, that is the problem with Philadelphia's Business Privilege Tax and Gross Receipts Tax on Philadelphia manufacturers, that within its own state (Pennsylvania), Philadelphia has erected inverse "physical barriers" (the physical boundaries of Philadelphia) in making everyone else's cost of goods less expensive than its own manufacturers.

Simply, the Philadelphia Business Privilege Tax and Gross Receipts Tax grants preferences to manufacturers not located in Philadelphia, be they in Pennsylvania, any other state or even a foreign country.

It cannot be said that this revenue measure is a neutral factor in economic decision-making. Manufacturers are leaving Philadelphia's physical boundaries en masse, other counties and cities within the Commonwealth of Pennsylvania are actively soliciting the Philadelphia manufacturers to come to their towns and cities. Surely, this is not what the state legislature intended and it is a perversion of the tax that was enacted to supposedly enhance Philadelphia's general revenue.

The Business Privilege Tax and Gross Receipts Tax are either applicable to all Pennsylvania manufacturers; or not applicable to all Pennsylvania manufacturers, which is what the Pennsylvania Supreme Court stated was and is the intent of the Pennsylvania General Assembly.

The United State's Supreme Court in *American Trucking Associations, Inc. v. Smith, supra*, and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra,* found that once a state's tax statute is held invalid under the Commerce Clause, the state is obligated to provide relief consistent with federal due process principals, U.S. Const. Art. 1, § 8, Cl. 3; U.S. Const., Amends. Five and Fourteen.

The case before the court merely includes the city along with the state and they should provide the same relief as stated above.

The Pennsylvania Supreme Court has defined the term "abuse of discretion" as follows:

> An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown

> by the evidence or the record, discretion is abused.

In re Women's Homeopathic Hospital of Philadelphia, 393 Pa. 313, 316, 142 A.2d 292, 294 (1958).

Evidence was placed on the record as to the anti-competitive nature of the Business Privilege Tax, how it is directly figured into the cost of goods sold and its effect on price, making Petitioner's products more expensive within the City of Philadelphia, its site of manufacture than an out-of-state competitor, or a Pennsylvania manufacturer located either in Bucks or Montgomery County or any other location in Pennsylvania other than Philadelphia.

Petitioner asks the Court what sense does that make. Petitioner directs this Court's attention to *Cali v. Philadelphia*, 406 Pa. 290, 177 A.2d 824 (1962). In *Cali*, the Pennsylvania Supreme Court prohibited Philadelphia from pursuing a course of conduct that was permitted by its City Charter but in contravention of the state's intent from a state statute.

The court cited Article II, § 18 of the 1949 Enabling Act (25 P.S. § 13133) which provided that:

> Notwithstanding the grant of powers contained in this act, no city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are . . . (b) Applicable in every part of the Commonwealth. (c) Applicable to all cities of the Commonwealth.

The Statutory Construction Act, Act of December 6, 1972, P.L. 1339, No. 290, § 3, *et seq.*, 1 Pa. C.S.A. § 1501, *et seq.*, provides that:

> In ascertaining the intention of the General Assembly in the enactment of a statute, the following presumptions, among others, may be used: "... (4) that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language."

1 Pa. C.S.A. § 1922.

Here the Pennsylvania Supreme Court repeatedly stated that a manufacturing business is to be excluded from Business Privilege Tax and gross receipts taxes and that uniformity within the state and competition throughout the country dictate that no pass-through Business Privilege Tax or Gross Receipts Taxes are applicable to Pennsylvania manufacturers, regardless of Philadelphia's Enabling Tax legislation and Philadelphia's subsequent enactment of such a tax.

The Philadelphia Business Privilege Tax has not been challenged as to its applicability to manufacturers. The foregoing argument is one of first impression and shows its infirmities, as to validity, uniformity, being anti-competitive, bias, and prejudicial. It violates both the State Constitution and the Commerce Clause of the Federal Constitution because it favors non-Philadelphia manufacturers over Philadelphia manufacturers.

The Philadelphia Tax Review Board's decision in denying Petitioner's petition to refund its Philadelphia Business Privilege

Tax and Gross Receipts Tax as to a Philadelphia manufacturer was and continues to be an abuse of discretion as shown by the record.

These are constitutional questions of substance which the Commonwealth Court decided. The Commonwealth Court did not account for Petitioner's argument as to certain constitutional questions dealing with uniformity, due process and equal protection, nonetheless these are matters as to the City of Philadelphia's application of the Philadelphia Business Privilege Tax and its Gross Receipts Tax as to Philadelphia manufacturers not heretofore determined by the Pennsylvania Supreme Court. It is a matter of first impression.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT ENTERED MAY 10, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 585 Eastern District
Allocatur Docket 1994

INSINGER MACHINE COMPANY,

Petitioner

v.

PHILADELPHIA TAX REVIEW BOARD,

Respondent

Petition for Reconsideration

ORDER

PER CURIAM

AND NOW, to wit, this 10th day May, 1995, the Application for Reconsideration of Denial of Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation.

Appendix A

TRUE COPY FROM RECORD
Attest: May 10, 1995
s/ Patricia Johnson
PATRICIA JOHNSON
Chief Clerk
Supreme Court of Pennsylvania
Eastern District

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA ENTERED MARCH 31, 1995

IN THE SUPREME COURT OF PENNSYLVANIA

No. 585 Eastern District
Allocatur Docket 1994

INSINGER MACHINE COMPANY,

Petitioner

v.

PHILADELPHIA TAX REVIEW BOARD,

Respondent

Petition for Allowance of Appeal from the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 31st day of March, 1995, the petition for allowance of appeal is denied.

Mr. Justice Montemuro is sitting by designation.

TRUE COPY FROM THE RECORD
Attest: March 31, 1995
s/ Patricia Johnson
PATRICIA JOHNSON, Chief Clerk
Eastern District
Supreme Court of Pennsylvania

APPENDIX C — OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED JUNE 24, 1994

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1503 C.D. 1993

ARGUED: May 11, 1994

INSINGER MACHINE COMPANY,

Appellant

v.

PHILADELPHIA TAX REVIEW BOARD ("TRB")

BEFORE: HONORABLE DAVID W. CRAIG, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES R. KELLEY, Judge

OPINION BY JUDGE KELLEY FILED: June 24, 1994

Insinger Machine Company (Insinger) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) affirming the decision of the Philadelphia Tax Review Board (board). The board denied Insinger's petition for a refund of a business privilege tax imposed by the City of Philadelphia (City). We affirm.

Appendix C

Insinger is a manufacturer of commercial kitchen equipment with its manufacturing facilities and offices located in the City. The First Class City Business Tax Reform Act[1] (Tax Reform Act) grants the authority to the City, as a first-class city, to levy and collect an annual tax on the taxable receipts of businesses, which includes manufacturers operating within its city limits. Pursuant to this authority, the City enacted an ordinance imposing a municipal business privilege tax to begin in the year 1985. *See* Philadelphia Code Chapter 19-2600, Business Privilege Taxes.

Section 19-2603 of the Philadelphia Code imposes the tax upon every person engaging in business in the City. Section 19-2604(4) provides manufacturers an alternative receipts tax computation.

On or about March 23, 1988, Insinger filed with the City's Department of Revenue (Department) a petition for refund of business privilege tax for the years 1985, 1986, and 1987.[2] The Department denied Insinger's petition on April 13, 1988.

On May 6, 1988, Insinger appealed the Department's denial to the board. A hearing was held before the board on August 11, 1992,[3] after which the board denied Insinger's petition for a refund. The parties stipulated at the hearing before the board that Insinger is a manufacturer.

---

1. Act of May 30, 1984, P.L. 345, *as amended*, 53 P.S. §§ 16181 - 16193.

2. Insinger requested a refund of (1) $4,670.00 for the year 1985; (2) $8,025.00 for the year 1986, and (3) $10,687.00 for the year 1987.

3. There is no explanation in the record as to the approximately four-year delay between the filing of Insinger's refund petition appeal in 1988 and the holding of a public hearing by the board on the petition in 1992.

Appendix C

Insinger timely appealed the board's decision to the trial court. By order dated May 25, 1993, the trial court denied Insinger's appeal and affirmed the board's decision. This appeal followed.[4]

On appeal, Insinger argues that (1) the board committed an abuse of discretion in applying the City's business privilege tax to manufacturers; and (2) the City's business privilege tax is invalid as to manufacturers because it is unconstitutional under the Federal and/or State Constitutions.

In support of its argument that the board committed an abuse of discretion in applying the City's business privilege tax to Insinger as a manufacturer, Insinger contends that the General Assembly did not intend for the City to levy a business privilege tax on Philadelphia manufacturers as a valid exercise of the City's taxing authority. We disagree.

The Tax Reform Act permits the City, as a first class city, to levy and collect an annual tax on the taxable receipts of businesses operating within the city limits. 53 P.S. §§ 16183-16184. The definitional section of the Tax Reform Act defines a manufacturer as "a person whose business is the sale of goods, commodities, wares or merchandise of its own manufacture, growth or production." 53 P.S. § 16182. Business is defined in the Tax Reform Act as the "carrying on or exercising, for gain or

---

4. This court's scope of review where, as here, the trial court takes no additional evidence is the same as that of the trial court; whether constitutional rights were violated, an error of law was committed, or the board's findings of fact were supported by substantial evidence. Section 754(b) of the Local Agency Law, 2 Pa.C.S. § 754(b); *City of Philadelphia, Department of Revenue v. Tax Review Board of the City of Philadelphia To the Use of Sawin Systems, Inc.*, 157 Pa. Commonwealth Ct. 43, 628 A.2d 1220 (1993).

profit, within a city of the first class, any trade, business, . . . profession, vocation or commercial activity or making sales to persons within such city of the first class." *Id.* The City's ordinance imposing the business privilege tax contains verbatim these same definitions of manufacturer and business. *See* Philadelphia Code § 19-2601. In addition, both the Tax Reform Act and the City's ordinance contain a section providing for an optional calculation of the tax for manufacturers. Accordingly, the board did not abuse its discretion in applying the City's business privilege tax to Insinger, as a manufacturer located and doing business within the City's limits.

Insinger cites several cases in support of its argument that an imposition of such a tax on manufacturers is disfavored by the courts because it competitively disables manufacturers. However, the cases relied upon by Insinger are not applicable to the present situation as they address whether or not the City of Pittsburgh, a second class city, may impose a business privilege tax on manufacturers under the Local Tax Enabling Act.[5]

The City of Pittsburgh is specifically prohibited under the provisions of the Local Tax Enabling Act[6] from levying, assessing, and collecting a tax on goods and articles manufactured within the city's limits. 53 P.S. § 6902. However, there is no specific prohibition applicable to first class cities in the Tax Reform Act. On the contrary, it is clear by the language of

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5. Insinger cites *Harsco Corp. v. City of Pittsburgh*, 516 Pa. 562, 533 A.2d 1012 (1987), *Atlantic Refining Company Case*, 398 Pa. 30, 156 A.2d 855 (1959), *Golden Triangle Broadcasting, Inc. v. City of Pittsburgh*, 483 Pa. 525, 397 A.2d 1147 (1979); and *H. J. Heinz Co. v. Pittsburgh*, 170 Pa. Superior. Ct. 435, 87 A.2d 96 (1952).

6. Act of December 31, 1965, P.L. 1257, *as amended*, 53 P.S. §§ 6901 - 6922.

the Tax Reform Act that the General Assembly intended for first-class cities to be empowered with the authority to impose a business privilege tax on manufacturers. *See* 53 P.S. §§ 16181 - 16193.

While Insinger acknowledges that the cited cases deal primarily with the City of Pittsburgh, it argues that our Supreme Court's statements in those cases, *i.e.*, that prohibiting a tax on manufacturers promotes uniformity, competitiveness, and encourages job growth, should be just as applicable to manufacturers located in the City of Philadelphia. This court believes, as did the trial court, that Insinger's arguments are more in the line of a political argument and, therefore, are best presented to the General Assembly.

Next, Insinger argues that the City's business privilege tax is unconstitutional because it violates the Commerce Clause of the United States Constitution by favoring non Philadelphia manufacturers over Philadelphia manufacturers.[7]

Section eight, clause three of article one of the United States Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ." U.S. Const. art. I, § 8, cl. 3.

It is well settled that taxes which unfairly burden interstate commerce are invalid. The United States Supreme Court articulated a four point test to determine the validity of a tax

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7. Municipal ordinances are subject to the same scrutiny under the commerce clause as are state laws. *See Waste Recycling. Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993).

challenged as burdensome to interstate commerce in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under this test, a challenged tax does not offend the commerce clause if it (1) is applied to an activity with a substantial nexus to the taxing jurisdiction; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the authority levying the tax.

Applying this standard to the City's business privilege tax, we conclude that the tax does not violate the commerce clause. First, the business privilege tax is applied to an activity with a substantial nexus to the City. The tax is applied to every person engaging in business within the City and the City clearly has authority under the Tax Reform Act to tax businesses within its jurisdiction. The City does not impose a tax on the taxable receipts sales made to parties outside the City limits but only on taxable receipts sales made to parties within the City limits. *See* Philadelphia Code § 19-2601.

Second, the City's business privilege tax must be fairly apportioned. This means that the tax cannot be duplicative, but must be structured so that if every state were to enact a similar law there would be no multiple taxation. *Equitable Life Assurance Society v. Murphy*, 153 Pa. Commonwealth Ct. 338, 368, 621 A.2d 1078, 1093 (1993). In addition, the tax imposed must reasonably reflect the in-state component of the activity being taxed. *Id.* (citing *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983)).

The City's business privilege tax is fairly apportioned. Under the Tax Reform Act, only the City, as the sole first-class city in Pennsylvania, has the authority to impose a tax on a manufacturer's taxable receipts sales made to persons within the

city limits. Therefore, only the City has the jurisdiction to tax such sale and no other locality could tax such a sale pursuant to a similar ordinance. Furthermore, because only taxable receipt sales of manufactured goods made to persons within the City limits are being taxed, the in-state or in-city component of the sales being taxed is reflected.

Third, the City cannot impose a heavier tax burden on non-domiciliaries than on its own residents without discriminating against interstate commerce. *Equitable Life*, 153 Pa. Commonwealth Ct. at 368, 621 A.2d at 1093 (citing *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); *H.K. Porter Co., Inc. v. Commonwealth*, 111 Pa. Commonwealth Ct. 463, 534 A.2d 169 (1987)). Insinger contends that Philadelphia manufacturers are being discriminated against in violation of the commerce clause because non-Philadelphia manufacturers do not have to pay the business privilege tax. We disagree.

The third prong of the *Complete Auto* test requires that *non-domiciliaries* cannot be burdened with a heavier tax than the residents subject to the taxing authority's power. *Id.* The tax imposed by the City is solely on the taxable receipts sales of manufacturers and other persons engaging in business within the City limits. Manufacturers domiciled outside the City's limits are not subject to the business privilege tax on sales made within the City limits. Therefore, the City's tax does not discriminate against interstate commerce as non-domiciliaries of the City are not subject to the City's business privilege tax.

Finally, "a tax must be fairly related to services provided by the City because it is the taxpayer's activity or presence within the state which justifies its being made to bear a share of the tax

burden." *Equitable Life*, 153 Pa. Commonwealth Ct. at 369, 621 A.2d 1093 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)). In the present case, only persons engaged in business within the City limits are subject to the tax and those persons, such as Insinger and other manufacturers, are serviced by all the municipal services provided by the City. To provide these services, the City must have a revenue base which may be obtained through the imposition of taxes that all taxpayers must share. *See D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). The Tax Reform Act enables the City to establish such a revenue base by specifically providing that the business privilege taxes collected by the City "shall be used by the [C]ity for general revenue purposes of the [C]ity." *See* 53 P.S. § 16183.

Accordingly, Insinger's contention that the City's business privilege tax is unconstitutional under the commerce clause must fail[8] and the trial court's order is affirmed.

s/ James R. Kelley
JAMES R. KELLEY, Judge

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8. Insinger's contention in its statement of the questions presented that the City's business privilege tax is unconstitutional, as being violative of the uniformity, equal protection and due process clauses of the United States Constitution and the Pennsylvania Constitution, will not be addressed as Insinger failed to present arguments in its brief in support thereof.

Appendix C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1503 C.D. 1993

INSINGER MACHINE COMPANY,

Appellant

v.

PHILADELPHIA TAX REVIEW BOARD ("TRB")

ORDER

NOW, this 24th day of June, 1994, the order of the Court of Common Pleas of Philadelphia County, dated May 25, 1993, at No. 9209-1785, is hereby affirmed.

s/ James R. Kelley
JAMES R. KELLEY, Judge

APPENDIX D — OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, CIVIL TRIAL DIVISION ENTERED OCTOBER 19, 1993

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NO. 9209-1785

COMMONWEALTH COURT DOCKET
NO. 1503 C.D. 1993

INSINGER MACHINE COMPANY

v.

PHILADELPHIA TAX REVIEW BOARD

OPINION

AVELLINO, J.

Insinger Machine Company ("Insinger") has appealed from my order dated May 25, 1993, which affirmed an earlier decision of the Tax Review Board ("TRB"). The appeal raises two issues: 1) whether the TRB erred in upholding the legality of the Philadelphia business privilege tax ("BPT") as applied to manufacturers ("MBPT"), and, 2) whether the MBPT is at odds with the Commerce Clause of the federal Constitution.

Briefly, Insinger manufacturers commercial kitchen equipment, and has its principal place of business in

Philadelphia. The First Class City Business Tax Reform Act explicitly empowers Philadelphia to impose a BPT on manufacturers.[1] Pursuant to this authority. Philadelphia enacted the MBPT.[2]

Insinger contends that the MBPT requires it to price its products higher than the analogous products made by out-of-city competitors. As a result, Philadelphia-made products suffer in the marketplace. Insisting that the MBPT eventually will force local manufacturers to relocate, Insinger argues that in the long run the tax will cost the city more revenue than it is likely to generate.[3] Insinger may be right. Nevertheless, determinations of this sort are beyond my ken, and, per extensio, beyond that of the TRB. Stated differently, Insinger must present its political argument to another tribunal, for example, the City Council.

Finally, Insinger may not elevate its economic concerns to a constitutional level. True, the MBPT probably imposes a modest burden on interstate commerce. Nevertheless, Insinger may not invoke the Commerce Clause of the federal constitution because that provision protects the commercial interests of *non-residents.*[4] For example, it prohibits state and local lawmakers

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1. 53 P.S. § 16181 et seq. (1984).

2. Phila. Code § 19-2600 et seq. (1984).

3. *Cf.*, NT AT 26, Mr. Thomas for the City: "And I think that the arguments that Mr. Cantor has made on behalf of his client — I think that maybe some of us would perhaps agree with the policy determinations. But the City Council has decided to do otherwise and does not see fit to grant a manufacturing exemption. And that is the law."

4. *See, e.g.*, Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 2d Ed., § 6.5 et seq. (1988).

from discriminating against out-of-state enterprise in favor of local enterprise.[5] Moreover, a Commerce Clause challenge is particularly inappropriate where, as in this case, the ordinance in question specifically *excludes* sales made to customers outside of Philadelphia.[6]

BY THE COURT

s/ Avellino
J.

DATE: 10/19/93

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5. *Id.*

6. *See* Phila. Code § 19-2601 (excluding from taxable receipts sales made to parties outside the first class city). Additionally the notes of testimony indicate that Insinger has already been afforded the benefits of this exclusion. *Id.* at 25-26.

APPENDIX E — DECISION OF THE TAX REVIEW BOARD DATED MARCH 1, 1993

MARCH 1, 1993

IN RE: INSINGER MACHINE COMPANY
DOCKET NO: 40-880506-4

STATEMENT OF RECORD:
1. Petitioner filed a Petition for Refund of Business Privilege Tax on May 6, 1988 for the years 1985, 1986, and 1987.

2. Following a public hearing before the Tax Review Board on August 11, 1992 it was the decision of the Tax Review Board to deny the Petition.

3. A Notice of Appeal to the Court of Common Pleas was received by the Tax Review Board on

FINDINGS OF FACT:
1. At the hearings it was stipulated by the parties that the Petitioner is a manufacturer. Notes of Testimony, Page 13.

2. The Petitioner's manufacturing facilities and office are located in Philadelphia.

CONCLUSIONS OF LAW:
1. Petitioner's manufacturing business is subject to the Business Privilege Tax.

The Business Privilege Tax is authorized by the First Class City Business Tax Reform Act, 53 P.S. 16181 et al. This Act does not provide an exemption or exclusion for manufacturers. 53 P.S. 16182 "Business". To the contrary, the Act specifically provides for the inclusion of manufacturers by offering an "(o)ptional

calculation of portion of tax for manufacturers." 53 P.S. 16184(b).

The Business Privilege Tax Regulations specifically include manufacturers in Section 102 which states that (b)oth the license and tax provisions of the Ordinance apply to . . . (3) Manufacturers.

It may be, as Petition argued, that manufacturers who do business in Pennsylvania but outside of Philadelphia have been exempted from similar taxation. The Tax Review Board will not conclude from this that a similar exemption is required for manufacturers in Philadelphia. The legislature has granted Philadelphia a broad taxing power which Philadelphia has chosen to use. While the taxpayer may believe that it would be a better public policy decision to exempt manufacturers from the burden of this tax, the Tax Review Board is not charged with setting public tax policy.

Therefore the decision of the Tax Review Board is to deny the petition.

APPENDIX F — DECISION OF THE TAX REVIEW BOARD DATED AUGUST 19, 1992

CITY OF PHILADELPHIA

10th Floor
Philadelphia, Pa. 19107
Municipal 6-5216
Fax-215-686-7809

August 19, 1992

RICHARD CANTOR, ESQ.
530 SWEDE STREET
NORRISTOWN, PA 19401

RE: INSINGER MACHINE COMPANY
DOCKET # INSINGERMACH-40-880506-4
OLD DOCKET:
ACCT.#: F52D1218031
PROPERTY:

Dear Sirs,

This is to advise you of the decision of the Tax Review Board in the subject case which was rendered on AUGUST 11, 1992 for the following individual tax types and taxable periods:

——TAX TYPE——TAXABLE PERIOD——DECISION——
BUSINESS PRIVILEGE 01/85 to 12/31/87 PETITION DENIED

For information pertaining to the new bill to be issued by the Department of Revenue please contact the telephone number as stated on your previous bill.

Appendix F

You have thirty (30) days from the mailing date of this letter to appeal to the Court of Common Pleas.

Very truly yours,

s/ Royal D. Hart
Royal D. Hart
Administrator

cc: Revenue Department / L&I
Law Department
Controller's Office
File

MAILING DATE: AUG. 21 1992

APPENDIX G — DECISION OF THE TAX REVIEW BOARD DATED APRIL 13, 1988

CITY OF PHILADELPHIA

DEPARTMENT OF REVENUE
Municipal Services Building
John F. Kennedy Blvd. at 15th Street
Philadelphia, Pa. 19102

T# 21991

April 13, 1988

Insinger Machine Co.
6245 State Rd.
Phila, Pa. 19135

RE: 1985-7 Business Privilege Refund
$23,382.00 #1218031

Dear Sirs,

This is to advise you that your request for a refund of the Business Privilege Tax paid has been denied.

According to the Technical Staff of the Department of Revenue the City of Philadelphia operates under different enabling legislation than the City of Pittsburgh. Therefore, the decision in the HARSCO case does not apply. The tax paid was due.

Ordinance of City Council provides that you may, if you so desire, appeal this decision of the Revenue Commissioner to the Tax Review Board within ninety (90) days from the date of the

mailing of this letter. The office of the Tax Review Board is located in Room 802, City Hall Annex, Philadelphia, PA 19102.

Sincerely,

s/ Karl Orth
Karl Orth
Department of Revenue
Refund Unit

KO/gd
cc: Tax Review Board